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No. 00-144

Supreme Court, U.S.
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In The

Supreme Court of the United States

FULTON COUNTY, GEORGIA, et al.,

Petitioners,

v.

FLANIGAN'S ENTERPRISES, INC. OF GEORGIA, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENTS' FLANIGAN'S ENTERPRISES, INC. OF GEORGIA, 6420 ROSWELL ROAD, INC., HARRY FREESE, FANNIES, INC., AND WILLIAM H. PARKS, JR.'S BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following list identifies all of the parties to the proceeding in the United States Court of Appeals for the Eleventh Circuit whose judgment is sought to be reviewed:

Fulton County, Georgia,

Appellee Below.

The Board of Commissioners of Fulton County, Georgia,

Appellee Below.

Mitch Skandalakis,

Appellee Below.

Nancy Boxill,

Appellee Below.

Gordon Joyner,

Appellee Below.

Robert Fulton,

Appellee Below.

Tom Lowe,

Appellee Below.

Emma Darnell,

Appellee Below.

Michael Hightower,

Appellee Below.

PARTIES TO THE PROCEEDING – Continued

Flanigan's Enterprises, Inc. of Georgia,

Appellant Below.

6420 Roswell Road, Inc.,

Appellant Below.

Harry Freese,

Appellant Below.

Fannies, Inc.,

Appellant Below.

William H. Parks, Jr.,

Appellant Below.

Ceeda Enterprises, Inc.,

Appellant Below.

CORPORATE DISCLOSURE STATEMENT

There are no parent corporations or publicly held companies owning 10% or more of the stock of the corporate Respondents.

TABLE OF CONTENTS

Page

PARTIES TO THE PROCEEDING i

CORPORATE DISCLOSURE STATEMENT iii

TABLE OF AUTHORITIES v

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI 1

STATEMENT OF THE CASE 1

ARGUMENT 5

I. The decision below does not raise a significant, undecided question of federal constitutional law 5

II. The decision below does not conflict with any decision in any Circuit 7

CONCLUSION 11

TABLE OF AUTHORITIES

Page

CASES

Ambassador Books & Video, Inc. v. City of Little Rock, 20 F.3d 858 (8th Cir. 1994) 10

Barnes v. Glen Theatres, Inc., 501 U.S. 560 (1991) 3, 5

Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485 (1984) 8

City of Erie v. Pap's A.M., 529 U.S. 277 (2000) 2, 3, 4, 5, 6

DiMa Corporation v. Town of Hallie, 185 F.3d 823 (7th Cir. 1999) 7, 8

Edenfield v. Fane, 507 U.S. 761 (1993) 8

Genusa v. City of Peoria, 619 F.2d 1203 (7th Cir. 1980) 9

Hurley v. Irish-American Gay, Lesbian and Bisexual Group, 515 U.S. 557 (1995) 8

Mitchell v. Comm'n on Adult Entm't Establishments on the State of Delaware, 10 F.3d 123 (3rd Cir. 1993) 10

Postscript Enters. v. City of Bridgeton, 905 F.2d 223 (8th Cir. 1990) 10

Renton v. Playtime Theatres, 475 U.S. 41 (1986) 4

Sammy's of Mobile, Ltd. v. City of Mobile, 140 F.3d 993 (11th Cir. 1998) 4

Turner Broadcasting System v. FCC, 512 U.S. 622 (1994) 8

TABLE OF AUTHORITIES – Continued

Page

United States v. O'Brien, 391 U.S. 367 (1968) 2, 5, 7

Wall Distribs., Inc. v. City of Newport News, 782 F.2d 1165 (4th Cir. 1986)..... 6

Ward v. Rock Against Racism, 491 U.S. 781 (1989) ...8, 9

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Flanigan's Enterprises, Inc. of Georgia, 6420 Roswell Road, Inc., Harry Freese, Fannies, Inc., and William H. Parks, Jr. (collectively "the Clubs") respectfully submit that the decision below correctly analyzed the facts and applied governing law, and that the Petition for Writ of Certiorari, presenting no valid grounds for review, should be denied.

STATEMENT OF THE CASE

The facts controlling the questions presented by Fulton County and its Board of Commissioners (collectively "the County") are set forth in detail in the opinion of the Court of Appeals. Pet. App. A at 1a-23a.[1] This case does not concern cities in Texas, Minnesota, or Indiana, nor does it deal with decisions to zone adult theaters into industrial districts. This case does not concern California's treatment of alcoholic beverages in the early 1970s, nor Alabama's treatment of alcoholic beverages in the latter 1990s. Nor do the facts of the case address speculation or conjecture. Those slates are chalked for a different time and a different place.

[1] The Clubs take issue with certain subsidiary fact-findings by the Eleventh Circuit, which apparently did not alter the analysis of the court below. For instance, the Clubs contend that the County never in fact submitted the out-of-state studies to the Board for review and "reliance." In depositions, none of the Board of Commission members could specifically recall reviewing the studies prior to voting the Ordinance into law.

This case concerns Fulton County and its legislative record. The court below properly determined that on this record no reasonable basis exists to believe that the Ordinance will further a substantial governmental interest. The Court reached this conclusion only after examining the factual record, and determining that the Ordinance simply failed the *O'Brien* test. *United States v. O'Brien*, 391 U.S. 367 (1968). The lower court did nothing more or less than apply the test set out by this Court in *Pap's* by allowing affected businesses to challenge legislative findings of fact. *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000).

Fulton County drafted a Resolution directing an advisory committee and departmental staff ("the County Staff") to study the activities, businesses, and properties of the three Respondent Clubs and the three other existing Fulton County adult entertainment establishments, for the sole purpose of determining whether the Ordinance was warranted. Pet. App. A at 3a.

The County commissioned its police department to conduct a study of the crime statistics concerning twelve drinking establishments; six featuring adult entertainment and six which did not.[2] *Id.* That study concluded:

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[2] Prior to adopting the Ordinance, the County and the "adult entertainment establishments located in Fulton County" did not "jointly" conduct studies regarding negative secondary effects. *Compare* Pet. at 4. The studies conducted by the Fulton County Police Department and the County's designated real estate appraiser, Dabney & Associates, were *independently* prepared, with no input from the adult clubs other adult entertainment representatives.

> There was no statistical correlation showing an increase in crime in adult entertainment establishments that served alcoholic beverages. Rather, the statistics indicated greater instances of calls for service and reported crime at non-adult entertainment establishments that served alcoholic beverages.

Id.

The six adult dance clubs also commissioned studies which examined their "economic impact upon their surrounding environs." *Id.* at 4a. Those studies did "not identify any detrimental impacts as caused by the Clubs." The County commissioned an analysis and critique of the Clubs' studies, which validated their findings and concluded that the "Clubs had caused no quantifiable 'blight' upon their environs." *Id.* at 5a.

A public hearing on the Ordinance was held on November 19, 1997. At that hearing, while it is true that the "Board received testimony from representatives of the adult entertainment establishments opposing the Ordinance, as well as testimony from citizens in favor of the proposed Ordinance" (Pet. at 5), the Board also received a recommendation from its specially formed Adult Entertainment Committee that the Ordinance was not warranted. Yet the County enacted the Ordinance.

The Eleventh Circuit began its analysis by noting that it could find "no basis" for the Fulton County's contention that pursuant to *Barnes v. Glen Theatres, Inc.*, 501 U.S. 560 (1991) and *Pap's*, the Court could merely "presume the evidence needed to meet the second prong [furthering a governmental interest] of the *O'Brien* test." *Id.* at 16a (clarification added). The court observed further that

unlike *Pap's* and its own earlier decision in *Sammy's of Mobile, Ltd. v. City of Mobile*, 140 F.3d 993 (11th Cir. 1998), *cert. denied*, 529 U.S. 1052 (2000), the adult businesses had "challenged and disproved the board's findings." *Id.* at 16a. Accordingly, the Eleventh Circuit concluded that, in the language of *Renton*,[3] "it was unreasonable for Defendants to have relied upon remote, foreign studies concerning secondary effects when the county's own current, empirical data conclusively demonstrated that such studies were not relevant to local conditions." *Id.*[4]

The court below commented that, unlike *Renton*, this was not a circumstance where an adult business either did not exist or had just moved into town. To the contrary, the businesses in Fulton County operated for nearly a decade. *Id.* Thus, it held that blind "reliance" upon "foreign" studies was simply not reasonable or permitted under the circumstances.

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[3] *Renton v. Playtime Theatres*, 475 U.S. 41 (1986).

[4] Contrary to the representation made by the County, the "studies from other jurisdictions" did not find "secondary effects caused by adult entertainment establishments." (Pet. at 4-5). These "additional studies" are by now familiar to this Court. *See, e.g.*, Brief of Amici Curiae of the First Amendment Lawyers Association, and Appendix, filed in the case of *City of Erie v. Pap's A.M., supra*, available on LEXIS-NEXIS at 1998 U.S. Briefs 1161 (providing critical analysis of the same "studies" cited by Fulton County concluding that the dated and foreign studies do not link negative secondary effects with adult entertainment establishments).

ARGUMENT

I. The decision below does not raise a significant, *undecided* question of federal constitutional law.

This Court, in recent years, has twice addressed the protection afforded nude dancing in the face of speech-suppressing legislation. *See City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000); *Barnes v. Glen Theatres, Inc.*, 501 U.S. 560 (1991). In these cases, this Court established a standard which requires courts to undertake just the kind of fact-sensitive, "case-by-case" analysis carried out by the Eleventh Circuit in this case. The lower court conscientiously applied this Court's standard and reached the correct result.

The doctrine considered by *Barnes* and explicated by *Pap's* was the secondary effects doctrine and its relationship to the test enunciated in *O'Brien*. *See*, 391 U.S. at 376-77. *Pap's* involved an ordinance almost identical to that in *Barnes* that made it a summary offense to knowingly or intentionally appear in public in a "state of nudity."

This Court, in a plurality opinion by Justice O'Connor, with Justice Souter concurring in part and dissenting in part, reversed the Pennsylvania Supreme Court and held that the Erie ordinance was constitutional. The plurality opinion reviewed *Barnes* and essentially adopted the doctrines set out therein by reaffirming the content-neutral nature of the ordinance, and applying the *O'Brien* test. In so holding, this Court found that Erie relied on its own findings and noted the first-hand knowledge which the city council members had of what took place around

nude dancing establishments in Erie. With this understanding, this Court stated:

> Here, Kandyland has had ample opportunity to contest the council's findings about secondary effects – before the council itself, throughout the state proceedings, and before this Court. Yet to this day, Kandyland has never challenged the city council's findings or cast any specific doubt on the validity of those findings. Instead, it has simply asserted that the council's evidentiary proof was lacking. In the absence of any reason to doubt it, the city's expert judgment should be credited.

Pap's, 529 U.S. at 298.

The above-quoted language lends concrete support for the analysis carried out by the Eleventh Circuit. So, although a legislative body is not *required* to cause empirical studies of secondary effects to be prepared, where empirical data has been prepared and properly submitted to the legislative body prior to the adoption of a questioned ordinance or statute, the empirical data cannot be ignored.[5] Here, the Clubs commissioned studies of real estate values, and neighborhood conditions which showed that no adverse secondary effects existed in Fulton County. The County in turn commissioned a similar study which found the Clubs' studies to be accurate. The

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[5] *Compare Wall Distribs., Inc. v. City of Newport News*, 782 F.2d 1165, 1169 n.7 (4th Cir. 1986) ("To insist that governmental interests justifying such legislation could only be found in specific local experiences and conditions would be unrealistically to require deliberate subjection to those experiences and conditions before attempting to avoid them.")

County also prepared a study of crime and found a lower crime rate at nude clubs than other alcohol-serving establishments. The Clubs thus completed the steps outlined in *Pap's* and moved within the ambit of that case.

It is clear that Question I (of the County's "Questions Presented," *see* Pet. at i) incorporates a misstatement of the Eleventh Circuit's holding. The Eleventh Circuit did not hold that Fulton County must suffer negative secondary effects or that it must ignore foreign studies. Rather the Eleventh Circuit held that given the factual record before it, which included foreign and local studies, Fulton County had no reasonable basis to believe that the ordinance it proposed would "further a substantial governmental interest."

Indeed, the courts of appeals have uniformly applied the *O'Brien* test explicated above, but to very different facts and therefore have reached different conclusions. There is no reason to believe that other courts would have disagreed with the Eleventh Circuit if presented with the facts of this case.

II. The decision below does not conflict with any decision in any Circuit.

The County asserts the existence of conflict among the circuits, relying principally upon cases such as *DiMa Corporation v. Town of Hallie*, 185 F.3d 823 (7th Cir. 1999) to support its proposition. These cases do not conflict with, but are supportive of, the Eleventh Circuit's analysis.

A common ground in all First Amendment cases is that the factual record will affect the outcome. This Court

has repeatedly insisted that when a government seeks to justify a restriction on speech "as a means to redress past harms or prevent anticipated harms," it "must demonstrate that the recited harms are real, not merely conjectural." *Turner Broadcasting System v. FCC*, 512 U.S. 622 (1994); *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993). Even appellate courts hearing free speech cases must independently review the factual records developed by trial courts or administrative agencies. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*, 515 U.S. 557, 566-68 (1995) (independently reviewing a state court judgment). Independent review of the facts is required "to be sure that the speech in question actually falls within the unprotected category and to confine the parameters of any unprotected category within acceptably narrow limits." *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 505 (1984).

When laws infringing First Amendment rights are challenged, other circuits recognize that the factual record must be examined. In *DiMa*, for example, the town of Hallie adopted an ordinance regulating "adult-oriented establishments in various ways." The plaintiff only challenged one of the restrictions: the hours of operation. *DiMa*, 185 F.3d at 826. The case involved a facial challenge, *id.* at 826-27, in which the court's analysis "focus[ed] only on the first prong" of the time, place and manner test. *See id.* at 822 *citing Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (the first prong addresses whether restrictions are justified without reference to the content of the regulated speech).

The town of Hallie did not compile evidence regarding the hours of operation prior to enacting the ordinance. *Id.* at 829. In fact, although affirming the district court's decision to uphold the ordinance, the Seventh Circuit recognized that Hallie had "only minimally" justified the restriction. *Id.* at 830. Referring to the legislative record as "meager," *id.* at 831, the court nonetheless held the evidence sufficient, noting

> DiMa's First Amendment challenge is limited to the ordinance's hours of operation regulation, and we have no reason to believe that this is a significant impairment of Pure Pleasure's business.

Id. at 831.[6]

Other cases cited by the County only highlight the settled rule of law that factual records must be examined. *See, e.g., Genusa v. City of Peoria*, 619 F.2d 1203 (7th Cir. 1980) (holding "*nothing in the record* of this case or in common experience would warrant this court in concluding that adult bookstores contribute less than other forms of adult use to the injurious effects that may stem from a congregation of adult uses," *id.* at 1213, "[t]here is *nothing in the record* to indicate that adult bookstores, as a class, contain more faulty light switches or other violations

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[6] It should be noted that Respondents Mardi Gras, Flashers, and Fannies each placed uncontradicted affidavits in the record, in which they provided their annual gross revenues and profits (from previous years) derived from the sale of alcoholic beverages. The numbers were substantial. These sales figures supported the testimony of the Clubs that the Ordinance would seriously impair their ability to operate in a nude dance format in the greater Atlanta area.

than regular bookstores, as a class," *id.* at 1214, holding that certain disclosure requirements "cannot be sustained as furthering the state interest *shown by this record*," *id.* at 1216 (all emphasis added); *see also Mitchell v. Comm'n on Adult Entm't Establishments on the State of Delaware*, 10 F.3d 123 (3rd Cir. 1993) (holding "we believe the evidence *on this record* is sufficient to show Delaware had a substantial governmental interest in regulating the incidental adverse effects of Adult Book's speech-related activity," *id.* at 136-37, "A review of *this record reveals . . .* " *id.* at 141, "*This record shows* that the open-booth requirement was not enacted out of a mere unsupported legislative preference for the open booths or because the legislature arbitrarily or irrationally believed that closed booths contribute to serious health problems." *Id.* at 143 (all emphasis added).

Perhaps a different conclusion might have been reached had the local government not studied its *existing* adult businesses. *Compare Ambassador Books & Video, Inc. v. City of Little Rock*, 20 F.3d 858 (8th Cir. 1994) (court "reject[ing] the argument that adult business ordinances must be founded upon local experience," *id.* at 864, because the zoning ordinance was only enacted in response to a first-time adult business, *id.* at 859.). Or perhaps a sparse legislative record would have caused a different conclusion. *Compare Postscript Enters. v. City of Bridgeton*, 905 F.2d 223, 224 (8th Cir. 1990) (where "a formal record of the city council's proceedings concerning the ordinance d[id] not exist"). Those facts simply were not present in this case.

The Eleventh Circuit has not imposed an obligation on local governments to ignore foreign studies, or to

conduct their own, but rather has made clear that unreasonable restrictions on protected expression will not be tolerated under the First Amendment.

CONCLUSION

The Petition fails to demonstrate any valid ground for review of the decision below, and should be denied.

Respectfully submitted,

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